TEY SIEW CHOO

v.

TEO ENG HUA

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[DIVORCE PETITION NO: 33-74 OF 1998]
26 MAY 1999

FAMILY LAW: *Divorce - Civil marriage - Petitioner converted to Islam - Effect - Whether marriage dissolved - Whether still subsisted - Whether petitioner could resort to civil law for redress - Law Reform (Marriage and Divorce) Act 1976 ss. 3(3), 4, 33, 51, 53, 54*

The petitioner and the respondent had undergone a Buddhist customary marriage in 1982 and had registered the marriage under the Law Reform (Marriage And Divorce) Act 1976 ('the Act'). In July 1995, the petitioner embraced Islam and parted company with the respondent. Some three years later, ie. in August 1998, the petitioner petitioned for divorce under the Act. Before the learned judge, the petitioner argued that dissolution ought to be granted as her marriage had irretrievably broken down by virtue of her conversion to Islam and also by the facts as dictated in s. 54(1)(d) of the Act. The respondent had not in any way contested the petitioner's averments aforesaid, and that being so questions *inter alia* arose before the learned judge as to (i) whether the customary marriage, which was avoided by the Syariah law, was likewise avoided by the civil law (ii) whether a formal judicial pronouncement was required to end the marriage (iii) whether the petitioner, having so converted to Islam, had the *locus* to file for redress under the Act (iv) whether the court ought to dissolve the marriage.

Held:

[1] Under Syariah law the petitioner's marriage immediately dissolves upon her conversion as, by so embracing Islam, she has become subject to Muslim personal and religious laws. A conversion of one party to Islam, however, will not automatically dissolve a non-Muslim marriage under the civil law. Hence, notwithstanding the conversion, the petitioner's marriage to the respondent, in so far as the civil marriage is concerned, remains unaffected and still subsists. That being so, it requires a judicial pronouncement to end the marriage.

[2] Sections 3(3), 4 and 51(1) of the Act, and the authorities, make it clear that the unconverted spouse may petition for a divorce. However, as shown by s. 53 of the Act (*vide* the phrase "either party to a marriage

may petition for divorce" therein) Parliament never intended that the convert should be denied of this right. Clearly, therefore, the petitioner's conversion does not *per se* operate to deprive her of rights which may be otherwise available to her under the Act.

[2a] Further, the prohibition of the invocation of the Act is only against a Muslim or to any person who is married under Muslim law. The petitioner, when she married the respondent was yet to be a Muslim and so was never married under Muslim law. On that premise, there is absolutely no legal impediment to suggest that the Act is not applicable to the petitioner. The petitioner, therefore, must be entitled to petition under the Act.

[3] Regardless of the change in the petitioner's religious and social status, which by itself would make it just and reasonable to pronounce a decree of dissolution, this court is still statutorily required to have regard to one of the proofs of breakdown under s. 54 of the Act.

[3a] In this case, the petitioner, apart from admitting her conversion under para. 9 of enclosure 1, had adverted to the statutory 'fact' of s. 54(1)(d) as the facts alleged as causing or leading to the breakdown of the marriage. The evidence showed, however, that the respondent had not bothered to reply her affidavit pertaining to this matter. Legally he was therefore deemed to accept that fact. This also meant that without that contest the petitioner had, *prima facie*, proved that the marriage had irretrievably broken down. In the circumstances, it was just and reasonable to dissolve the civil marriage.

[Petition allowed. Marriage pronounced dissolved]

Case(s) referred to:

Eeswari Visuvalingam v. Government of Malaysia [1990] 1 CLJ 426
Hariram Jayaram v. Saraswathy Rajahram [1990] 1 CLJ 285
Joseph Jeganathan v. Rosaline Joseph [1989] 2 CLJ 616
Ng Siew Pian v. Abd Wahid Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain [1992] 1 CLJ 391
Pedley v. Majlis Ugama Islam Pulau Pinang & Anor [1990] 2 CLJ 391
PP v. Rajappan [1986] 1 MLJ 152
Tan Keok Yin v. Cheah Saw Hong [1991] 1 CLJ 815
Tan Sung Mooi v. Too Miew Kim [1994] 3 MLJ 1, 7
Vilayat Raj v. Sunila [1983] AIR Delhi 351

Legislation referred to:

Hindu Marriage Act 1955, ss. 2, 13(1)(ia)
Law Reform (Marriage And Divorce) Act 1976 (Act 164), ss. 3(3), 4, 33, 50(1), (2), 51, (1), (3), 53, (2), 54(1)(d)
Penal Code, s. 494

For the petitioner - Aslam Zainuddin; Federal Counsel
For the respondent - In person

Reported by WA Sharif

JUDGMENT

Suriyadi Halim Omar J:

On 14 April 1982 the petitioner's customary marriage to Teo Eng Hua was registered at the Registry of Civil Marriages, Melaka Utara, Melaka. Both were Buddhists. The marriage was blessed with four children, with the eldest being twenty one years of age whilst the youngest, eight. On 7 July 1995 the petitioner, embraced Islam and took the name of Tey Siew Choo @ Nur Aishah Tey Binti Abdullah. Her husband Teo Eng Hua did not follow suit. Due to that conversion both parties lived apart for a continuous period of no less than three years. On 10 August 1998 three years one month and three days to the day, the petitioner filed the current petition. In it she prayed that the marriage be dissolved.

The legal point to be disposed by me, is whether the petitioner could petition for an order of divorce under the Law Reform (Marriage And Divorce) Act 1976 (Act 164), eventhough already converted to Islam. In Malaysia separate systems of family and personal law exist for Muslims and non-Muslims. Under item 4(e) in List I (Federal Legislative List) in the Ninth Schedule of the Federal Constitution, is provided therein the legislative jurisdiction of Parliament in respect of family law for non-Muslims. Parliament similarly has the authority to legislate on Islamic family law but confined to the Federal Territory. Without the necessity of having to delve in depth, suffice if I may say that Muslims are dealt with under the Syariah law and the relevant Enactments of the respective States. A conflict of personal law may occasionally arise when one of the contending parties convert to Islam or even apostate, hence the matter at hand.

When necessary, as I move along, I shall touch briefly on the views regarding parties who have gone their separate ways, founded on religious beliefs. In the course of my research, I encountered differing views regarding married Muslim couples who apostalised, in particular the sensitive question as to whether their respective marriages must be dissolved judicially or not. Generally it is accepted that when only one of the parties of a non-Muslim couple embraces Islam, in the eyes of Syariah law, not only is that earlier marriage avoided against the converted person but the unconverted party loses all holds over the former unless within three months he or she follows suit. The consequential question that flows, bearing in mind the prevailing semi-

secular society that exists in our midst, what then happens to that earlier non-Muslim marriage in the eyes of the civil law? Must there be a necessity for a formal declaration made by a court of competent jurisdiction to end it, similar to any petition of divorce by non-Muslim couples?

Pursuant to the above comments, as there was a change in her religious status, in the eyes of Syariah law the marriage of the petitioner immediately dissolved without the necessity of a judicial pronouncement. By so embracing Islam, she became subject to Muslim personal and religious laws. Yet, inspite of that change, the petitioner's marriage to the respondent in so far as the civil marriage was concerned, remained unaffected. In other words the marriage still subsisted. I now supply my reasons for that view.

The marriage of the petitioner with the respondent was a customary one, proved by a Surat Akuan and a Gambar Kahwin. That marriage was subsequently registered pursuant to s. 33 of the Law Reform (Marriage And Divorce) Act 1976 (Act 164) (hereinafter referred to as "the Act"), at the Jabatan Pendaftaran Negara, Daerah Alor Gajah on 14 April 1982. It is trite, as provided for under s. 53 of the Act, either party to a marriage may petition for divorce on the ground that the marriage has irretrievably broken down. The only setback to the invocation of this Act is that it shall not apply to a Muslim or to any person who is married under Muslim law. Inspite of this prohibition the petitioner at the material time, already a Muslim, had been mindful to appear before me for redress. Due to this uncertainty, apart from the possibility of the incidence of conflict of laws, it is therefore necessary for me to urgently resolve the factor of her *locus* first.

Under this Act, no less than half the Malaysian population in particular the Muslim populace, is outside the purview of this Act. But not all is lost, as under s. 51 of the Act Parliament provides that where one party to a marriage has converted to Islam, the other party who is not a convert (hereinafter interchangeably referred to as the "unconverted spouse or party") may petition for divorce. The general provision of s. 3(3) also clearly provides that the decree of divorce successfully obtained by the unconverted spouse, shall be valid against the converted partner. As against this legal backdrop, Parliament has seen it fit to insert s. 4 which in a gist provides that any marriage solemnised under any law, religion, custom or usage is deemed to be registered. Unless avoided, that marriage shall subsist until dissolved by the death of one of the parties, ordered so dissolved by a court of competent jurisdiction or by a decree of nullity also made by a court of competent jurisdiction. To wind up on this point, unless the customary marriage of the petitioner with the respondent is dissolved by me, that marriage still subsists in the eyes of the Act.

Case law also points to that direction. I would like to touch first on the case of *Eeswari Visuvalingam v. Government of Malaysia* [1990] 1 MLJ 86, which gives a fair reflection of this principle. In this case the couple were married according to Hindu rites, with the marriage subsequently registered. The husband later embraced Islam. He later died. The deceased, prior to his death had not divorced the wife, nor one sought for by her under the Law Reform (Marriage And Divorce) Act 1976. As the deceased was a pensioner under the Pensions Act 1980, the wife promptly applied for the derivative pension. The Supreme Court decided that as the couple's marriage remained valid under civil law at the time of the death of the husband, she was therefore a dependant under the pension laws and thus entitled to claim. In relation to the current case, the significance of *Eeswari Visuvalingam v. Government of Malaysia* is that unless there is a formal divorce between the converted spouse and the partner, the nexus between them relating to certain legal matters will remain intact. The next case for consideration is *Pedley v. Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307. In this case the couple had married according to Catholic rites. The wife without the husband's knowledge had embraced the religion of Islam and assumed a Muslim name. The husband later applied, *inter alia*, for a declaration that the conversion of his wife had not terminated the marriage. Eventhough the court rejected the application, as it sought a mere legal right without proposing for any consequential relief, Wan Adnan J (as he then was), did opine that under civil law a non-Muslim marriage is not dissolved upon one of the parties converting to Islam. That conversion merely provides a ground for the other party who has not converted to petition for divorce. Again, *Pedley's* significance in relation to the current case is that, a conversion of one party to Islam will not automatically dissolve a non-Muslim marriage under the civil law. In other words, a proactive act is required to terminate that civil marriage performed earlier. For both the cases mentioned above, the personal law of the unconverted spouses and the civil law of the country were applied on them. The third case for my consideration is *Tan Sung Mooi v. Too Miew Kim* [1994] 3 MLJ 117. The facts of the case are that the couple were married under Chinese customary rites. In 1982 they decided to live apart. In 1988 the petitioner/wife left the matrimonial home and in 1989 filed a divorce petition under the Act. In 1991 the High Court granted a *decree nisi* to be made absolute after three months. Pending that order, the petitioner/wife filed an application for an order of division of matrimonial assets and for maintenance. On 9 January 1993, before the pending application could be heard, the respondent/husband embraced Islam. When the hearing date of the ancillary matters finally came, the respondent contended that being a Muslim the High Court had no jurisdiction over him. This was in view of s. 3(3) of the Act. He ventilated that only the Syariah Court had jurisdiction to deal with those matters. The petitioner/wife on the other hand

contended that since she had remained a non-Muslim, she could not come under the jurisdiction of the Syariah Court. The Supreme Court decided that the High Court had jurisdiction to hear the petitioner/wife's application for ancillary reliefs under the Act, notwithstanding the respondent's conversion to Islam after the divorce. The Supreme Court at p. 123 said:

> ... the Act only applies to non-Muslims and non-Muslim marriages. In the present reference, it is common ground that both parties were non-Muslims who contracted a non-Muslim marriage. ... From the above facts, it is without doubt that the Act applies to them since they were non-Muslims. It follows that ... matters affecting both parties' legal obligations as non-Muslims and incidental o the granting of the divorce, the High Court would have jurisdiction to hear and determine the ancillary proceedings despite the fact that the respondent had converted to Islam after the divorce but before the hearing of the ancillary application.

This case goes a step further, in that not only does it confirm that the respective personal law and the civil law of the country applies to the unconverted spouse but also were equally applicable to the converted party at the relevant stage.

Indisputably, ss. 3(3), 4 and 51(1) as supported by the above cases, settle once and for all that the unconverted spouse may file a petition (see also *Ng Siew Pian lwn. Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain* [1992] 2 MLJ 425). But do those provisions also provide the *locus* for the converted person to petition for a divorce under the Act? Having scrutinised the provisions, I am convinced that Parliament never intended that the convert should be denied of the same right. Section 53 of the Act reads that "either party to a marriage may petition for a divorce ...". This provision is self explanatory in that no discrimination exists against any contracting party to a marriage. The prohibition of the invocation of this Act is only against a Muslim or to any person who is married under Muslim law. The petitioner, when she married the respondent was yet to be a Muslim and similarly was never married under Muslim law. On that premise, there is absolutely no legal impediment to suggest that this Act should not be applicable to her. In fact Mohamed Dzaiddin SCJ in *Tan Sung Mooi v. Too Miew Kim (supra)* at p. 123 had occasion to say:

> Section 3(3) provides that the Act shall not apply to Muslims or Muslim marriages and that only non-Muslim marriages may be solemnized or registered. This clearly means that the Act only applies to non-Muslims and non-Muslim marriages.

In the unlikely event that the converted spouse were not to be allowed to move the petition for divorce under the Act, and the partner for some reason or other refuses to petition for divorce, a foreseeable awkward scenario may be

anticipated in the near future for the actors. Undivorced by judicial pronouncement, both therefore will be subject to the sanctions of civil law. On that score, if she were to re-marry, the probability of her being prosecuted for bigamy cannot be discounted. The husband is in no better position. Under s. 494 of the Penal Code, whoever having a husband or wife marries, in which case the marriage is void by reason of its taking place during the life of such spouse, if found guilty shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to a fine. Pursuant to the facts of this case, which falls squarely within the Exception of the abovementioned section, unless the marriage with the first husband has been declared void by a court of competent jurisdiction, the petitioner may face the wrath of the prosecutor (*Public Prosecutor v. Rajappan* [1986] l MLJ 152). Taking a bolder step forward, since they are still legally married under civil law, the respective properties of the parties will be potentially exposed to the claims of the other. I can only imagine the horrifying mess that may materialise when one party dies and the surviving spouse pops up and stake a claim on the estate of the deceased.

Whether on religious grounds or otherwise, if the petition were to be rejected on any technical ground, inspite of her new found status, no civil court would deny a non-Muslim husband the company of his Muslim wife. After due consideration, not only is this predicament against the petitioner's constitutional rights, let alone running contrary to her personal law, but also alien to the intention of Parliament.

Analogy aside, the final case which seals this legal poser is the case of *Vilayat Raj v. Sunila* [1983] AIR DELHI 351. This case I believe is on all fours with the current matter. In 1978, Sunila who was the respondent in this case, underwent a Hindu marriage with the petitioner, Vilayat Raj. Sometime in 1980 the parties separated. On 1 October 1981 the petitioner filed for dissolution of the Hindu marriage, on ground of cruelty pursuant to s. 13(1)(ia) of the Hindu Marriage Act 1955 (hereinafter referred to as "that Act"). It transpired that at the time of filing that petition the petitioner had embraced Islam. Armed with those facts, Sunila moved an application under s. 2 of that Act asserting that that divorce proceedings was not maintainable. She stated that by being a Muslim, thus losing the status of a Hindu, he therefore had lost his rights to move the petition under that Act. The crux of the legal poser appeared to be, whether the applicability of that Act depended on whether the parties were Hindus at the time of the solemnisation of the marriage or must they also be Hindus at the time of filing that petition. The court decisively concluded that the petitioner (husband) was entitled to move the petition under the relevant section of that Act inspite of the conversion. The court there at p. 355 said:

> Change of religion by one of the parties does not automatically dissolve the marriage but provides a ground to the other party for dissolution. Conversion also does not *per se* operate to deprive the party, of rights which may be otherwise available to him under the Act.

In the current case, the convert who also is the petitioner, and who also have resorted to an Act meant for non-Muslim marriages, by analogy therefore must be entitled to petition under the Act. Following the legal principles of those cases, the petitioner's new status at the presentation stage therefore is irrelevant, unlike the customary marriage stage. The next issue for consideration was whether the facts presented before me would permit me to grant the dissolution as prayed in the petition.

In passing, may I comment that under s. 50(1) of the Act no petition of divorce will be entertained unless two years have expired from the date of the marriage (hereinafter referred to as "the specified period"). That obstacle may be sidestepped by an application for leave before a judge, on the ground of exceptional hardship suffered by the petitioner. Apart from that situation, a petition may also be presented on the ground that the other party has converted to Islam. This ground has an additional advantage for the unconverted petitioner, as, by virtue of s. 51(3), no leave would be required to be applied unlike the situation envisaged by s. 50. The only bar is that no petition shall be presented before the expiration of the period of three months from the date of conversion. I am hard pressed to identify within s. 51 any situation that bestows that special privilege to a converted person. Even the closest is in another section ie, s. 50(2) whereat the phrase of "one of exceptional circumstances" is found, and within the ambit of which the convert's position could be considered. I will not go beyond this remark and thus leave it for another suitable forum. As it stands now, I am unable to fathom the rationale behind this discrimination. Regardless of the change in the petitioner's religious and social status, which in societal intercourse by itself would make it just and reasonable to pronounce a decree of dassolution, I still am statutorily required to have regard to one of the proofs of breakdown under s. 54 (*Joseph Jeganathan v. Rosaline Joseph* [1989] 3 MLJ 106). This latter provision must be complied with as, under s. 53(2) the court upon hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to a breakdown of the marriage, and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution. In the current case, the petitioner apart from admitting her conversion under para. 9 of encl. 1, adverted to the statutory "fact" of s. 54(1)(d), as the facts alleged as causing or leading to the breakdown of the marriage. Her next step was therefore to prove that factual requirement, unless

conceded to. As gauged from the file, the respondent had not bothered to reply her affidavit pertaining to this matter. Legally he was therefore deemed to accept that fact. This also meant that without that contest the petitioner had, *prima facie*, proved that the marriage had irretrievably broken down (*Hariram Jayaram v. Saraswathy Rajahram* [1990] 1 MLJ 114; *Tan Keok Yin v. Cheah Saw Hong* [1991] 2 MLJ 266).

At the end of the hearing I concluded that:

(i) for a civil marriage to end, inspite of one party having been converted, a judicial pronouncement is still necessary;

(ii) a converted petitioner is equally entitled to petition for a divorce under the Act;

(iii) pursuant to the current facts applicable to s. 54(1)(d), as adverted to by the petitioner and which were not contested, it was just and reasonable to dissolve the marriage; and

(iv) based on that finding I accordingly dissolved the registered marriage.